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Supreme Court of the United States.

OCTOBER TERM, 1891.

Term No., 175.

JAMES LARKIN AND WILLIAM J. McNAMARA,
PLAINTIFFS IN ERROR,

vs.

DAVID N. UPTON, PATRICK A. LARGEY, AND HOWARD H. ZENOR.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

Brief on behalf of the defendants in error.

W. W. DIXON,
M. F. MORRIS,
For Defendants in Error.

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I.

STATEMENT OF CASE.

This is a suit instituted, in pursuance of section 2326 of the Revised Statutes of the United States, by the defendants in error, as plaintiffs in the district court of the second

judicial district of Montana, to establish their right to certain mining property against the adverse claim of the plaintiffs in error, defendants in the district court.

The defendants in error, on January 19, 1879, had located certain mining property in Silver Bow county, in the Territory (now State) of Montana, under the name of "the Comanche lode claim" (Rec., p. 91). Subsequently, on May 23, 1881, the plaintiffs in error located "the Smelter lode claim," overlapping the Comanche claim, and including a little upwards of seven acres of the latter (Rec., p. 92). The controversy is over this tract of about seven acres.

The plaintiffs in error applied for a patent. The defendants in error adversed their application; and thereupon, in accordance with the provisions of the act of Congress, they instituted these proceedings to establish their title. The location by the defendants in error being confessedly prior in point of time to that of the plaintiffs in error, the latter sought to sustain themselves by showing an antagonism between the Comanche location and an adjoining location, designated as the Shannon claim, located prior to the Comanche claim, but for which a patent was not issued until after the Comanche location. The Shannon claim, as originally located and as it stood at the time of the Comanche location, was a considerable distance outside of the latter; but in the patent the Shannon boundaries had been shifted so as to take in some of the Comanche ground; and it was claimed that so much was taken in as to destroy the validity of the Comanche location.

A jury was summoned to try the issue between the parties; and this jury returned both special findings of fact and a general verdict in favor of the plaintiffs below, defendants here (Rec., p. 99, 102). Thereupon the court adjudged the title to be in the defendants in error (Rec., p. 113), and its decision was affirmed by the supreme court of the Territory (Rec., p. 129). A writ of error was sued out to remove the case to this Court.

Six bills of exception were taken (Rec., pp. 111 to 115); and upon these bills of exception six assignments of error are based. (Rec., pp. 129, 130.)

II.

BRIEF OF ARGUMENT.

1.

The record is in such bad condition that it is doubtful whether the Court should consider any of the errors alleged or assigned.

There is no statement on appeal, and only a statement on motion for a new trial. It is usual to stipulate in the court below that the latter statement may be considered in this Court as a statement on appeal; but nothing of the kind was done in this case.

The evidence is recited at length, or at least some of it is; and yet, while there is much included in the record which is irrelevant and useless, there are very important portions of the testimony omitted. For example, reference is made to a map which was in evidence, and which is not in this record, and the absence of which renders much of the evidence unintelligible. This map is very different from the map or plan contained in the brief filed for the plaintiffs in error. This latter, for instance, gives the course of the vein as due east and west, while the special findings of the jury show that this course was from northwest to southeast (Rec., p. 102). This condition of the record was commented on with some severity even in the supreme court of the Territory.

So that, if the case can be investigated here at all upon its merits, the inquiry must be confined to very few points; and we respectfully submit that the exceptions are scarcely in condition to be considered. There is no such recital of

antecedent testimony as to show whether the rulings and instructions complained of by the plaintiffs in error were or were not proper; and this Court should not be called upon to review them as abstract propositions of law.

2.

The first exception (Rec., p. 111) is based upon the refusal of the trial court, during the course of the testimony of Upton as a witness on his own behalf, to permit cross-examination to be interjected into the examination-in-chief and the allowance of the witness to testify as to the actual location of the boundaries of the Shannon claim at the time of the location of the Comanche claim.

This exception and the assignment of error based upon it seem to be abandoned by the plaintiffs in error in their brief, and it does not appear that any further argument of it is needed than the criticism of the supreme court of the Territory upon the point in its opinion. (Rec., pp. 122, 123.)

3.

The second bill of exceptions (Rec., p. 114) is based upon the alleged fact that the notice of location of the Comanche claim gave some of the corners as trees, when on the ground they were stakes.

It should be remembered that neither the laws of the United States nor the statutes of Montana require the posting of a location notice; nor do they require that in the recorded notice the boundaries or corners on the ground should be described. They simply require that the location should be distinctly marked on the ground, so that the boundaries could be readily traced. The fact in this regard to be determined by the jury was whether the location was so marked upon the ground. The witness Upton was interrogated to that effect, and he testified that he and his partner had marked the location by putting up stakes. This

was testimony for the jury upon the subject; and if the notice of location showed anything different or inconsistent with this, it is not apparent how it could have prejudiced the plaintiffs in error. The jury, in its third special finding, determined that the locators of the Comanche claim had distinctly located that claim upon the ground according to law; and this was a fact for the jury to determine.

Glick *vs.* G. H. & L. M. Co., 8 Montana, 298.
Gamer *vs.* Glenn, 8 Montana, 371.
Anderson *vs.* Black, 70 Cal., 226.
Taylor *vs.* Middleton, 67 Cal., 656.

4.

The third bill of exceptions (Rec., p. 112) is founded upon the refusal of the trial court to permit the plaintiffs in error to go into proof of the extent of a vein of ore which they claimed to have found in the discovery shaft of the Smelter lode after their location of it.

It is not at all apparent how this testimony was material. The exclusion of it certainly did no injury to the plaintiffs in error, inasmuch as, among its special findings, the jury found in favor of the plaintiffs in error the special fact which alone, if it was at all competent, could legitimately tend to prove, and that is that at the time of the Smelter location the locators of that lode found there a well-defined vein of ore (Rec., p. 101). In the trial the plaintiffs in error contended for the rule that "the discovery upon a quartz claim must be made at the time of location and before the record of the claim is made;" and that precise instruction was given by the court at the request of the plaintiffs in error (Rec., p. 105). But the plaintiffs in error seem in their brief to have abandoned this point also as wholly untenable.

5.

The exceptions to the admission and exclusion of testimony are, therefore, not well founded; and there remain

only the exceptions to the instructions given by the court to the jury.

It is very true that, at the request both of the plaintiffs and defendants below, the court gave certain instructions to the jury (Rec., pp. 103–109); and it is also true that, at the request of both parties and in response to interrogatories propounded by both parties, the jury rendered certain findings of fact covering all the points in issue in the case (Rec., pp. 100–102). They also returned a general verdict for the plaintiffs below. (Rec., p. 102.)

Now, it is respectfully submitted that where facts are specially found by a jury no instructions as to the law are necessary, or perhaps even proper; and the giving or refusing of instructions is wholly immaterial. In such cases the jury merely finds the facts: it does not apply the law; and it is immaterial to it what the law is. The court applies the law to the facts as found. Where a general verdict only is rendered, instruction to the jury upon the law is proper: for it is incumbent upon the jury in such cases not only to determine what the facts are, but also to give their conclusion upon the whole right of the matter.

But, however this may be, we submit that the instructions given here are correct. And yet it does not seem to us that it is at all necessary for this Court to consider them. As this Court will not review the testimony or pass upon the weight of the evidence, as the supreme court of the Territory was authorized to do, the only question for consideration here is, whether, upon the facts as found specially by the jury, the court was correct in its application of the law to the case, and in rendering the judgment which it rendered. Every material fact in the case was determined by the jury; and we submit that, upon these facts, the defendants in error were entitled to the judgment that was rendered in their favor.

6.

The main contention of the plaintiffs in error is that some part or the whole of the apex of the vein, upon which the Comanche location was made, was within the limits of the Shannon claim, as patented, and outside the limits of the Comanche claim; that, therefore, such vein belonged to the previously located Shannon claim, and had been appropriated by the Shannon location; and that the Comanche location, having no discovery of an unappropriated vein with an apex within its limits at the time it was made, was therefore void.

The plaintiffs in error labor hard and reason ingeniously to show that the facts support this contention: but a brief examination of the findings of the jury will show that they are entirely mistaken in regard to their supposed facts.

They are certainly mistaken in the statement on page 12 of their brief that the Shannon claim was patented at the time of the Comanche discovery. The record shows, and there is no question whatever about it, that the Comanche location was made on January 19, 1879 (Rec., p. 91); and that the Shannon patent was not issued until October 14, 1880 (Rec., p. 94–97). But this probably is of no great consequence. It is of very serious consequence, however, that the plaintiffs in error confound in their brief the apex of the vein with the vein itself, and so attribute to the jury findings of fact which the jury never made.

They assert that the special findings made by the jury in answer to the first and second interrogatories propounded on behalf of the plaintiffs below show that a part of the *apex* of the vein upon which the Comanche location was made was within the Shannon location and only a part within the Comanche location (Rec., p. 100). The word "*apex*" is not mentioned at all in either of these interrogatories, or in the answers thereto; and there is no reference whatever in either

of them to the apex. What the jury found was that part of the vein or lode, not the apex of it, was within the limits of the Comanche location. The only interrogatory in which the jury was asked anything in regard to the apex of the vein or lode, or in which the word *apex* is used or there is any reference even to an apex, is the first interrogatory propounded by the court at the request of the plaintiffs in error themselves (Rec., p. 101). There the jury was requested to find whether the *top* or *apex* of the vein upon which the Comanche location was made was within the limits of the Shannon claim: and their finding was THAT IT WAS NOT.

Plaintiffs in error attempt to infer from this, in direct opposition to the finding by the jury, that what the jury meant was that part of the apex was upon the Shannon claim and part upon the Comanche claim. This inference is utterly unjustifiable. If the jury had found that any part of the apex of the vein was within the Shannon claim it would have been easy for it to have said so. It did not say so. It said what was directly the reverse. For, when it said that the apex was not within the Shannon claim as patented, the plain inference is that no part of the apex was within the limits of that claim. Undoubtedly, a part of the vein or lode was within the Shannon claim, but no part of the apex was. The apex was wholly within the Comanche location, and according to the law, as contended for by the plaintiffs, the Comanche locators, having the whole of the apex, were entitled to follow the vein in its dip into and under the Shannon claim across the side lines of the Comanche claim.

Under these circumstances it seems somewhat presumptuous for the plaintiffs in error to attempt to defeat the Comanche location by reference to a vein of ore of which the Comanche locators have the entire apex and the Shannon locators have none, upon the theory that the vein actually dips into the Shannon claim.

7.

But it is claimed that the instructions upon this point were erroneous, because the jury was told that if any portion of the vein or apex was within the limits of the Comanche location it would be sufficient. (Rec., p. 103.)

In view of the special finding of the fact by the jury that the apex was not at all within the Shannon claim—that, in fact, no part of it was within that claim, we respectfully submit that this instruction became entirely immaterial. We believe it to be correct; but it is of no consequence whatever whether it was correct or not. It applies to a purely theoretical question that is entirely foreign to the facts of the case. And therefore it seems entirely unnecessary to follow the plaintiffs in error into an examination of the authorities cited in their brief as bearing upon this question.

The law, as laid down by this Court in the case of Gwillim *vs.* Donnellan (115 U. S., 45), was strictly followed in the trial of the present case.

8.

It is next alleged that the original complaint and amended complaint do not state facts sufficient to constitute a cause of action.

The complaint sets up the fact that the plaintiffs in error had applied for a patent, and that the defendants in error had duly adversed their application within the statutory time. But the dates of the application and of the adverse application were not mentioned; and this omission, it is claimed, so far vitiates the complaint as to constitute a fatal defect.

Of course, this contention is fallacious. The defect, if defect it is, is simply a want of certainty that is supplied by

the proof. It is not a total absence of necessary averment, but an insufficient averment of fact. The objection might have been available on special demurrer; but there was no such special demurrer. There was, it is true, a demurrer to the amended complaint on another ground (Rec., p. 8); but both this demurrer and the objection upon which it was based have passed out of the case. After answer and verdict, it is too late to raise the objection. It is too late in any event to raise it in this Court, as it was not raised in the court below, notwithstanding that there were two trials of the case, and the point was never made at any stage of the proceedings.

The plaintiffs in error cite the case of Mattingly *vs.* Lewisoln (8 Montana, 259). In that case there was no allegation whatever of adverse claim; and therefore, it plainly presented a very different case from the present.

9.

The Comanche location was confessedly prior in point of time to the Smelter location. If the former was valid, it was entirely immaterial what steps were taken by the Smelter locators, what discoveries they made, or when they made them. And therefore we deem it unnecessary to enter into any discussion of the instructions that relate to those points, or any discussion of the findings of the jury in regard to them.

10.

In their special findings of fact, the jury found in favor of the locators of the Comanche claim that these locators had done each and everything necessary to constitute a valid location under the law; and that their location was prior in point of time to that of the Smelter claim. These findings will be accepted as conclusive as to the facts; and the con-

clusion of law from them is inevitable that the defendants in error were entitled to the judgment that was rendered for them in the court below.

It is submitted, therefore, that this judgment should be affirmed.

W. W. Dixon,
M. F. Morris,
For Defendants in Error.